



News > Kauai News

'Following the rules'

[Print Page](#)

Challenge to Chair Asing's power fails

By Michael Levine - The Garden Island

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LIHU'E — A Kaua'i County Council member's attempt to clarify the process by which Chair Kaipo Asing builds the seven-member legislative body's agendas and sets its course fell flat Wednesday on the grounds it violated the state Sunshine Law.

Tim Bynum made a motion to add to the Asing-authorized agenda a proposed resolution clarifying the rules under which the chair is empowered to sanction agendas. County Attorney Al Castillo shot it down because it would have constituted a "reasonably major importance" and any action on it could only come after members of the public were made aware of the agenda item in advance.

Bynum's resolution would amend Council Rule No. 10(c), which says "bills and resolutions must be initialed by the council chair ... in order to be placed on the agenda," to include clarifying language saying the chair "shall not use this rule to restrict introduction of any bill or resolution introduced by any member indefinitely." This change would bring it into alignment with Council Rule No. 10(a), which says "any bill or resolution may be introduced by any member."

"I have on several occasions asked for items to be placed on the agenda that in my judgment warranted public discourse and decision making that you have not allowed," Bynum told Asing in a Feb. 17 letter obtained by The Garden Island. Bynum notes specifically a bill to put minutes on the Internet, a bill related to county attorney opinions, a bill to fund an ocean study in Po'ipu and a resolution to clarify the process to release confidential documents.

"I have shared with you my opinion that our current council rules are not intended to give the chair the authority to keep a council member's request off the agenda indefinitely," Bynum wrote to Asing. "I believe that a reasonable interpretation of rule 10(c) and the word 'initial' is to empower the chair to appropriately manage the agenda by timing placement.

"I believe that an elected official addressing their ideas and putting forth their proposals in the public forum is the point of the democratic process. Open discourse and public debate are fundamental to the process. If a member cannot be persuasive in their argument then the resolution or bill will fail, but to keep the discussion from ever occurring seems to me to be inappropriate," Bynum wrote.

In a letter to Asing and the rest of the council dated the same day, Bynum further wrote that the placement of an item on the agenda "is not a matter of discretion with the chair ... to grant or deny, but merely administrative in nature."

With the only two avenues of adding an item to the agenda — with Asing's initial or through a floor motion — effectively closed off, Asing, who finished fourth in voting in November's election behind Vice Chair Jay Furfaro, newcomer Derek Kawakami and Bynum, has essentially vested in himself a preemptive veto power even surpassing that held by Mayor Bernard Carvalho Jr. in that Asing's decisions cannot be overridden by a supermajority vote and that his decisions are shielded from public view.

After Bynum made the motion at the outset of Wednesday's meeting, Asing moved the discussion to the end of the agenda.

Five hours later, after dealing with the six-page agenda, Asing said Section 92-7(d) of the Hawai'i Revised Statutes precluded the council from voting on or even discussing Bynum's resolution because it is of "reasonably major importance and action thereon by the board will affect a significant number of persons."

Bynum provided to his fellow council members and the public a May 15 e-mail correspondence between himself and state Office of Information Practices staff attorney Jennifer Brooks in which she told him his proposed resolution "does not appear to be of reasonably major importance or to affect a significant number of people" and "appears suitable to be added to the agenda by a 2/3 vote, and the council would be acting in good faith in so adding it."

Castillo said the unanticipated matter should be discussed in executive session to protect the council from potential liability. After a 5-2 vote approving the secret session — Bynum and Lani Kawahara dissented — the council closed its doors for about an hour.

When it reconvened, Castillo told the council "the proposed resolution encroaches upon the duties of the chairman as the presiding officer of the council. Therefore it is of reasonably major importance. The way that the council is run affects all of the people in this county."

"The people of Kaua'i did not have an opportunity to know what was placed on the agenda. That's the reason for the Sunshine Law," Castillo said, adding that there are rules in place to govern how much time must elapse between the public posting of the agenda and the meeting to which it applies.

After Asing called the meeting back to order and ended discussion by quickly adjourning it to comply with Castillo's advice, the chair was asked if there were plans to include Bynum's resolution on the agenda for the next meeting.

"No," he said.

When asked if there was any reason why it would not be, as there is now enough time to bring the council into compliance with the Sunshine Law by posting the agenda item in advance of the June 16 meeting, Asing said, "Nothing especially."

"I am just following the rules of the council," he said.

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